BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

FILED
08-23-06
04:00 PM

Application of Pacific Gas and Electric Company for Authority to Increase Revenue Requirements to Recover the Costs to Deploy an Advanced Metering Infrastructure. (U 39 E)	Application 05-06-028 (Filed June 16, 2005)

APPLICATION FOR REHEARING OF DECISION 06-07-027 BY DIVISION OF RATEPAYER ADVOCATES

KAREN PAULL
Attorney for the Division of
Ratepayer Advocates

California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Phone: (415) 703-2630
Fax: (415) 703-4432

August 23, 2006

TABLE OF CONTENTS

I. INTRODUCTION

In Decision 06-07-027 ("the Decision"), the Commission approved PG&E's proposal to deploy an advanced metering infrastructure (AMI). In the same decision, it approved PG&E's proposal for a Critical Peak Pricing program for residential customers. The Division of Ratepayer Advocates (DRA) believes that this latter aspect of the Decision is unlawful, and therefore requests rehearing to correct that legal error.

II. THE CRITICAL PEAK PRICING PROGRAM APPROVED BY THE COMMISSION IS IMPERMISSIBLE UNDER AB1X

Water Code section 80110 (added by emergency session legislation Assembly Bill No. 1X during the energy crisis), provides, in relevant part:

> "*In no case shall the commission increase the electricity charges* in effect on the date that the act that adds this section becomes effective for residential customers for existing baseline quantities or usage by those customers of up to 130 percent of existing baseline quantities, until such time as the department [of Water Resources] has recovered the costs of power it has procured for the electrical corporation's retail end use customers as provided in this division." (Emphasis added.)

This provision of AB1X prohibits the Commission from granting any rate increases for the first 130 percent of baseline usage while the provision is in effect.

The Decision, however, approved a proposal by PG&E for a Critical Peak Pricing (CPP) program for residential customers that sets higher rates for all of a participating customer's usage during CPP events. DRA had proposed an alternative CPP program that would apply higher peak rates only to that portion of the usage over 130 percent of baseline, but the Commission rejected that proposal. The Commission acknowledged that the tariff it decided to approve "exposes those customers who sign up for it to a risk that they may be charged more" than rates in effect before the effective date of AB1X. (Decision, p. 35). The Decision nevertheless concludes that this tariff does not violate

AB1X because it will be offered on a voluntary basis and because "individual customers can waive the protections afforded by this provision of AB1X." (*Id.*)

DRA respectfully submits that this interpretation of the statute is erroneous.

A. AB1X Clearly and Unambiguously Prohibits Rate Increases for the First 130% of Baseline

The rules of statutory construction have been conveniently summarized by an appellate court decision about AB1X:

> "'The primary objective of statutory interpretation is to ascertain and effectuate legislative intent. To do so, a court first examines the actual language of the statute, giving the words their ordinary, commonsense meaning. The statute's words generally provide the most reliable indicator of legislative intent; if they are clear and unambiguous, [t]here is no need for judicial construction and a court may not indulge in it. Accordingly, '[i]f there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs.' "

(*Pacific Gas & Elec. Co. v. Dept. of Water Resources* (2003) 112 Cal. App. 4th 477, 495 (quoting *Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107) (citations omitted).) The opinion goes on to summarize the rules of construction that apply if the statutory language is ambiguous.

The provision of AB1X at issue here could not be clearer: "In no case shall the commission increase the electricity charges in effect [on the date AB1X took effect] for residential customers for existing baseline quantities or usage by those customers of up to 130 percent of existing baseline quantities." This rate protection is to be maintained "until such time as the department [of Water Resources] has recovered the costs of power it has procured for the electrical corporation's retail end use customers as provided in this division."[1] "Shall" is mandatory, as used in the Water Code. (*Id.* at 496 (discussing a different provision of AB1X).) The plain meaning of "in no case" is "under no

[1] The department is expected to have recovered its costs for its emergency purchases of power authorized by AB1X by 2011, although there is some uncertainty about the exact date.

circumstances." The statute does not provide for any exceptions, and "*in no case shall the commission increase the charges* . . ." clearly prohibits the Commission from creating any exceptions. Yet by approving higher rates during CPP events, that is exactly what the Commission has done. It has created an exception for a CPP tariff offered on a voluntary basis. But the statute prohibits rate increases for the first 130 percent of baseline, period. The Commission exceeded its authority by creating an exception to that mandate.

B. In Previous Decisions, the Commission Has Held That the Rate Protection Provision of AB1X Is Clear and Unequivocal

The Commission has previously held that the rate protection provision of AB1X is clear and unequivocal, and plainly prohibits any rate increases for the first 130 percent of residential customers' baseline usage. See, *e.g.*, Decision 04-02-057 (rate protection provision is "unequivocal;" "the Legislature, for the life of the legislation, does not want residential customers to pay more money than they were paying on February 1, 2001 for the baseline quantity they were receiving on that date. Likewise, residential customers should not pay more than they were paying on February 1, 2001 for their usage of electricity of up to 130% of the baseline quantity they were receiving on that date." See also Decision 04-040020 (the phrase "electricity charges," which is not defined in the statute or the code, refers to total rates, including both commodity and non-commodity components of the rates).

B. AB1X Does Not Allow an Exception for Rates Offered on a Voluntary Basis

As explained above, AB1X prohibits the Commission from raising rates for the first 130 percent of baseline under any circumstances, for as long as the rate protection provision is in effect. Yet the Decision concludes that it may approve rates that are higher than those allowed under AB1X because those rates are offered on a voluntary

basis, and "individual customers can waive the protections afforded by this provision of AB1X. (Decision, p. 35; Conclusion of Law No. 10, on p. 66.)[2]

This interpretation of AB1X is fundamentally erroneous. This statute placed a specific restriction on what the *Commission* may do. It expressly and unambiguously prohibits *the Commission* from raising rates for the first 130 percent of baseline usage. The Commission may not circumvent the statute's express mandate by characterizing the statute as merely creating an individual right that an individual may waive. AB1X says nothing about the rate protection provision being waivable, and nothing in the language or purpose of the statute suggests any basis for inferring that it is waivable. The provision protects individual customers from rate increases, but it does so by requiring the Commission not to authorize rate increases that are specifically prohibited.

C. The Statute Serves a Public Purpose, Defined By the Legislature

As DRA pointed out in comments on the Draft Decision, California law generally permits individuals to waive certain statutory rights by private agreement (provided the waiver is knowing and voluntary), but not "a law established for a public reason." (Cal. Civil Code § 3513.) The Decision concludes that individual customers can waive the rate protections of AB1X because the purpose of the rate protection provision is "to protect individual residential customers from being forced to pay more for electricity – up to 130% of their baseline allowance – than what they would have paid for the same usage prior to the enactment of AB1X." Although not entirely clear on this point, the Decision appears to reject the suggestion that this law was enacted "for a public purpose," which arguably constitutes an additional reason why the Commission may not authorize a utility

[2] The Decision does require that customers receive notice that by signing up for the CPP program they are waiving their right to rate protection under AB1X. Conclusion of Law No. 10, No. 11.)

to solicit customers to waive the protection afforded them by the statute. (See discussion on page 35 of the Decision.) [3]

There can be no doubt that AB1X was enacted "for a public purpose." It is emergency legislation enacted during the energy crisis, following the Governor's Declaration of Emergency in January 2001, because "reliable reasonably priced electric service is essential for the safety, health, and well-being of the people of California." (Water Code § 80000(a).) The Legislature found that the impact of unforeseen shortages of power in 2000 and 2001 and "rapid and substantial increases in wholesale energy prices and retail energy rates . . . constitutes an immediate peril to the health, safety, welfare, life and property of the inhabitants of the state." (*Id.*) The Legislature determined that under those circumstances "the public interest, welfare, convenience and necessity" required the state to step in and purchase power to ensure service to the public. (*Id.*; see also *PG&E v. DWR, supra,* 112 Cal. App. 4th 477, 481-487 (describing history of AB1X.) The rate protection provision at issue clearly flows from the Legislature's concern about protecting the public – and residential ratepayers in particular – from excessive costs, which are mentioned several times in the statute. (See, e.g., directive to DWR in section 80100 to purchase power in order to achieve reliable service at the lowest possible price and to secure as much low-cost power as possible under contract.) Thus, there can be no doubt that the statute was enacted for a public purpose.

D. The Commission May Not Override the Stated Purpose of the Legislature, Even in the Name of Current Policy Goals

Although the Decision characterizes the rate protection provision of AB1X as not a provision enacted for a public purpose, it states that "customers who voluntarily waive their AB1X protections are *serving* a public purpose by participating in a program to

[3] It is not clear that Civil Code section 3513 is applicable, because it applies to waiver of statutory rights by private agreement, and does not address the discretion (or lack thereof) of a regulatory agency. However, if the law holds invalid private agreements between individuals to waive statutory protections enacted for a public purpose, surely a regulatory agency charged with enforcing such protections may not authorize the businesses it regulates to ask customers to waive those protections.

decrease peak demand." (Decision, p. 35, footnote 32.) Decreasing peak demand may be a valid policy goal at present, but there is nothing in the language of AB1X to suggest that it was the Legislature's purpose in enacting that law. The Commission may not override the Legislature's clearly stated purpose in the name of the Commission's current policy goals.

III. CONCLUSION

The Commission has exceeded its authority by approving CPP tariffs that put participating residential customers at risk of paying higher rates than those permitted by AB1X. To approve such a tariff violates the express mandate of AB1X. The fact that this tariff would be offered on a voluntary basis does not cure the problem. The Commission should reconsider this aspect of the Decision and should ensure that any time-variable tariffs it approves in its place are consistent with AB1X.

.

Respectfully submitted,

/s/ Karen Paull

KAREN PAULL
Attorney for the Division of
Ratepayer Advocates

California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Phone: (415) 703-2630
Fax: (415) 703-4432

August 23, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of **"APPLICATION FOR REHEARING OF DECISION 06-07-027 BY DIVISION OF RATEPAYER ADVOCATES** in **A.05-06-028** by using the following service:

[**X**] **E-Mail Service:** sending the entire document as an attachment to an e-mail message to all known parties of record to this proceeding who provided electronic mail addresses.

[ ] **U.S. Mail Service:** mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Executed on the 23rd day of August, 2006 at San Francisco, California.

/s/ Joanne Lark

Joanne Lark

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address and/or e-mail address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

* *

SERVICE LIST
A.05-06-028

sdebroff@sasllp.com
cmanzuk@semprautilities.com
chris@emeter.com
kgolden@adamsbroadwell.com
nsuetake@turn.org
kpp@cpuc.ca.gov
pfa@cpuc.ca.gov
jeffgray@dwt.com
jmrb@pge.com
Service@spurr.org
michaelboyd@sbcglobal.net
jbradley@svlg.net
bill@jbsenergy.com.
jweil@aglet.org
pforkin@tejassec.com
case.admin@sce.com
janet.combs@sce.com
mdjoseph@adamsbroadwell.com
bruce.foster@sce.com
marcel@turn.org
bwt4@pge.com
DJRo@pge.com
jrcj@pge.com
JxGb@pge.com
lrn3@pge.com
SEB4@PGE.COM
shaunao@newsdata.com
edwardoneill@dwt.com
lisa_weinzimer@platts.com
pxo2@pge.com
saw0@pge.com
lawcpuccases@pge.com
barryeisenberg@comcast.net
l_brown123@hotmail.com
pthompson@summitblue.com
tony.foster@itron.com
mrw@mrwassoc.com
jharris@volkerlaw.com
dmarcus2@sbcglobal.net
rschmidt@bartlewells.com
LColton@echelon.com
sarveybob@aol.com
jeff@jbsenergy.com
gabriellilaw@sbcglobal.net
puma@davis.com
tdtamarkin@usclcorp.com

kmills@cfbf.com
laura.rooke@pgn.com
rabbott@plexusresearch.com
agc@cpuc.ca.gov
adf@cpuc.ca.gov
cyc@cpuc.ca.gov
ctd@cpuc.ca.gov
cjb@cpuc.ca.gov
dug@cpuc.ca.gov
eaq@cpuc.ca.gov
jf2@cpuc.ca.gov
lmi@cpuc.ca.gov
mbe@cpuc.ca.gov
mcv@cpuc.ca.gov
rsk@cpuc.ca.gov
gig@cpuc.ca.gov
scl@cpuc.ca.gov
u19@cpuc.ca.gov
tmr@cpuc.ca.gov
awp@cpuc.ca.gov
Mmesseng@energy.state.ca.us